



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL CASE NUMBER 46 OF 2015

STEP UP HOLDINGS (K) LTD.....1ST PLAINTIFF

BENARD GIKUNDI MWARANIA.....2ND PLAINTIFF

MARGARET KARWIRWA MWONGERA.....3RD PLAINTIFF

-VERSUS-

THE STANDARD GROUP LIMITED.....1ST RESPONDENT

WAHOME THUKU.....2ND RESPONDENT

JUDGMENT

1. Background

The plaintiffs were at all material times business persons carrying on various businesses within the Republic of Kenya.

The 2nd plaintiff Bernard Gikundi Mwarania Claims International repute as a consultant. The 1st plaintiff held and operated various Bank accounts, in various banks in the republic of Kenya, and for proposes of this suit, Family Bank Limited and Bank of Africa Ltd, Nakuru Branches.

2. On or about 11th June 2012 Family Bank Limited instituted Nakuru HCCC No. 201 of 2012 against the plaintiffs among other parties, claiming for itself and on behalf of Mt. Kenya University, and obtained *ex parte* orders to freeze Step Up Holdings (K) Ltd (1st plaintiff) bank account at Bank of Africa, Nakuru Branch, which orders were later on lifted by the court.

3. Following the above, Standard Group Limited in its daily publication in The standard Newspaper of the 11th June 2012 published an article titled “*Judge freezes firm’s bank account.*”

On the 16th July 2014 another publication entitled “*University, firm fall out over alleged bank fraud,*” followed by a story on the matter with a subtitle “*Complex Web.*” was published.

By the publication above and particularly the one of the 16th June 2014, the plaintiffs felt defamed in their individual and corporate characters, in different ways.

The said publication led the plaintiffs to file this suit seeking numerous reliefs.

4. The pleadings

The suit was filed by a plaint dated the 15th June 2015. The plaintiffs sought reliefs that

(a) A permanent injunction restraining the defendant either by themselves, their servants or agents or otherwise howsoever, from publishing or causing to be published words of defamatory of the plaintiff.

(b) A mandatory injunction enquiring the defendant either by themselves, their servants or agents or otherwise howsoever, to remove the story titled “UNIVERSITY, FIRM FALL OUT OVER ALLEGED BANK FRAUD” from their Standard Digital and Facebook or any other media.

(c) An order directing the defendant to give a full apology

(d) General, Exemplary and aggravated damages of libel and malicious falsehood

(e) Costs of the suit

(f) Interest on (d) and e) above

(g) Any such further or other relief as may to this Honourable court appear fit and just grant.

5. The defendants filed a joint statement of defence, and denied all and singular the allegation of defamatory publication touching on the plaintiffs, individually and collectively, in their newspapers. **It is their defence that the publications made on the 16th June 2014 were so made without any malice nor were they false, but related to fair reporting of facts and claims made in court proceedings in a public court, being fair comments made in good faith without malice on matters of public interest.**

6. In Particular, the defendants cited **Nakuru Civil case No. 201 of 2012** between the parties wherein it reported, citing the orders issued by the court on the 11th June 2012 and therefore being court proceedings before a public court, it was a matter of public interest and sought to rely on the provisions of **Sections 6 and 7 of the Defamation Act, Cap 36 Laws of Kenya** and **Schedule 1** thereof.

7. The plaintiffs called four witnesses while the defence evidence was tendered by the second defendant.

The plaintiff produced as PExhibit 1 a bundle of documents that the defence consented to and thus admitted.

8. ISSUES FOR DETERMINATION

(1) Whether the plaint raises a reasonable course of action against the defendants

(2) Whether the publication in the defendants Newspaper of the 16th June 2014 referred to the plaintiffs and if so, whether they are defamatory.

(3) Whether the defences pleaded are available to the defendants

(4) Whether the plaintiffs are entitled to the remedies sought.

9. **Black's Law Dictionary 10th Edition Page 506** defines the word **defamation to mean**

“malicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person. If the alleged defamation involves matter of public concern, the plaintiff is constitutionally required to prove both the statements falsity and the defendant's fault.

If further states

“Defamation is the publication of a statement which tends to lower a person in the estimation of right – thinking members of society generally, or which tends to make them shun or avoid that person.”

10. **The Defamation Act 2013, Chapter 36 Laws of Kenya** is the statute that underpins the legal principles in the matter of libel and slander.

There is no dispute that the complained of article was published on the 16th June 2014. The article is highlighted and quoted extensively in the plaint – Par. 11 under the heading

“University, firm fallout over alleged bank fraud.”

By the said article, the plaintiffs allege that in their natural and ordinary meaning or by imputation and innuendo meant and were understood to mean that.

11. Of the 1st Plaintiff

(a) Is a company engaging in dishonest and corrupt business practices.

(b) Is a company that engages itself in fraudulent business activities.

(c) Is unethical and unscrupulous company

- (d) Is a company that engages in unjust enrichment in illegal activities.
- (e) Is a company that engages in criminal and illegal activities.
- (f) Is a company that carries business in complete and utter disregard of the law
- (g) Is a company that had no regard whatsoever to the rights and interest of its business partners.

12. Of the second and third plaintiffs

- a) They are liars, crooks and fraudsters of the highest order
- b) They are compulsive and cheats
- c) They are fraudulent and corrupt business persons
- d) They are self-conceited persons
- e) They are greedy person within insatiable appetites for money.
- f) They are insensitive persons whose only interest in life is in enriching themselves.

And therefore, the publication has brought their reputation to odium and public ridicule in the eyes of right thinking members of the society and the business community of which they are respected members.

13. In coming to the above innuendoes and conclusions, the plaintiffs claimed that the defendants did not cross check the allegations against the court case. **Nakuru HCCC No. 201 of 2012**, and, failed to note

- (a) that the case had not been heard and fully determined, hence plaintiffs not found culpable*
- (b) That no ruling had been made on the matters reported about*
- (c) That the article did not concern the court case*
- (d) That the orders granted on 11th June 2012 were no longer in force.*

14. Against the above backdrop, it is the duty of this court to consider the parties pleadings, evidence and submissions against the issues stated for determination.

15. Analysis, findings and determination

The dispute here revolves around the case **Nakuru HCCC No. 201/2012** and the orders issued by the court, in particular Justice Ouko, (as he then was) dated the 11th June 2012.

The relationship between the plaintiffs and the various banks was in the public domain as it was clearly captured in the court pleadings in the above court case. The claims and counter-claims are out there in the various affidavits, as well as the Memorandum of Understanding (MOU) between Mount Kenya University, and the 1st plaintiff Step Up Holdings (K) Ltd, who at the time did not have legal capacity to offer University education and degrees. This worked well, in terms of the MOU upto January 2011 when Mt. Kenya University was granted a Charter. The relationship became sour leading to the case, HCC 201/2012.

16. **PW1** was the 2nd plaintiff. He testified on behalf of the other plaintiffs who were co-directors of the first plaintiff.

He testified to have been aware of Nakuru HCCC 201 of 2012 where Family Bank sued the first plaintiff alleging its bank accounts were fraudulently opened, and the orders freezing its accounts at Bank of Africa Limited on the 11th June 2012, and the defendant reports on the **13th June 2012** and the consent orders regarding the frozen account and further, another suit of **Judicial Review Application No. 3 of 2012** through which the accounts were unfrozen.

17. It is therefore evident that the accusations arose from the above case from which the defendants, by an article appearing on its Newspaper, published the court orders and reported on the dispute, the subject of the court case.

18. The complaint about the report on 16th July 2014 was two fold.

- (1) That the photographs appearing alongside the report of Retired President His Excellency Mwai Kibaki, Prof. Stanley Waudu the Vice Chancellor of the University, and Simon Nyutu Gicheru. In his understanding, **PW1** testified, that the retired President's photograph carried an innuendo that he was a party to the dispute, yet the case cited only 4 defendants, while they were seven. That,

in his own opinion, it painted them as fraudulent, following which, it was his testimony that banks colleagues, and all persons dealing with them treated them with suspicion.

19. On cross examination, **PW1** owned up that he did not know the publication was from the court proceedings. He however maintained that the main complaint was that the former president's photograph appeared alongside the publication. He also testified that the investigations involved the Banking Fraud Unit.

(2) **PW1** avered that anybody reading the report would conclude that there was a ruling by Justice Ouko J on the 11th June 2014, and not 8th June 2014 and therefore the case was finalised which was not the case.

20. **PW2** and **PW3** evidence was not different from **PW1's** evidence and all agreed that a Newspaper had a duty to disseminate information to the public, if it was of public interest. They all agreed that the case was of interest to the public.

PW3 Margaret Karwirwa testified that due to the report her business deteriorated as anybody would think that they had defrauded Mt. Kenya University.

21. In its totality, the plaintiffs testified that the story as published did not capture the claims and counterclaims in the HCC No. 201 of 2012 objectively and that the story was not derived from the court case.

22. The defence evidence was tendered by the 2nd defendant, who denied that the publication was defamatory, but was of a public interest and based on court documents in HCC No. 201 of 2012 which was a dispute between the two institutions, the first plaintiff, Mt. University and Family Bank as an interested party.

He elaborated on the issues in the case, the orders issued by the Judge and that the **phrase "Complex Web"** in the story was picked from the court papers, as filed and not of his own making.

23. It was his further evidence that "**Benchwatch**" was a column the 1st defendant used to publish in the newspaper about court cases of public interest.

He denied, on cross examination, that the pictures of the three persons were meant to attract wide readership.

There is therefore no doubt that the article complained of, words and photographs were published by the defendant, referred to the plaintiffs as being disputants and parties in **Nakuru HCCC NO. 201 of 2012**.

24. On the issue whether the plaint raised a reasonable course of action against the defendant.

PW1 (2nd plaintiff) under cross examination could not point any defamatory statement in the impugned publication. Other than pointing at the three photographs the witness could not support, or give fresh, to the innuendoes stated in the plaint. If the Retired President, His Excellency President Mwai Kibaki felt defamed by his photograph appearing alongside the Article, he would have readily sued the publisher. The witness (**PW1**) did not testify to have had obtained a Power of Attorney or authority to sue on behalf of the Retired President.

25. The witness could not substantiate allegations that he and his family had to relocate from Nakuru to Nanyuki as a result of the publication.

He however and readily agreed that the matter was of public interest.

26. All the plaintiffs' witnesses could not pinpoint what they alleged to have been untrue, false, or defamatory about the article, save to state that they suffered unsubstantiated loss and damage to their reputation, which was not qualified.

The 1st plaintiff is a limited liability company which operates by its directors, the 2nd and 3rd plaintiffs.

27. In an action for defamation, proof must be rendered that the impugned article referred to the plaintiffs and so understood by the right thinking persons as referring to the plaintiffs.

Without a doubt, the first plaintiff was in the business of offering academic services and was in some understanding with Mt. Kenya University to offer management services to Mt. Kenya University Nakuru Campus.

28. In my opinion, the point of focus, to a right and reasonable thinking member of the society, high or low, would refer to the company (1st plaintiff) and not the directors, who would only come to the fore and limelight when mentioned by their names, or by their photographs alongside the story complained of.

It was **PW1's** evidence that he basically had no issue with the story as published, save for the retired president's photograph, which he testified was so published in bad faith, and out of malice, and knowing that the story was untrue.

29. The photographs of the two directors were not published. None of the directors' friends, colleagues, family members or friends testified to have formed any adverse opinions or reactions against the two directors.

Despite **PW1** stating that the story was brought to his attention by his son, he did not testify. One Fred Momanyi Ratemo read the news article, as well as PW1's students. None testified that the article made them to ridicule, scorn or shun him indeed no witness testified to have formed a low opinion that reduced PW1's reputation as a consultant. It thus turns out that the 2nd plaintiff (PW1) had nothing to complain about over the Article.

30. The court is minded that a person's reputation ought to be preserved at all times. To that end, the plaintiffs cited the case **Purcell –vs- Westinghouse Broad Co, 191, A 2nd 662 (Par 163)** where **Supreme Court of Pennsylvania** opined that:

“A man's good name is as much his possession as his physical property. It is more than property. It is his guardian angel of safety and security. It is his lifesaver in the sea of adversity, it is his parachute when he falls out of the sky of good fortune. It is his plank of rescue in the quicksands of personal disaster.”

31. So were the 2nd and 3rd plaintiffs exposed to hatred, ridicule and contempt, or did the Article/words tend to lower the plaintiffs in the estimation of the right thinking members of the society generally?

The subheading,

“University, Firm Fall Out Over Alleged Bank Fraud”

32. In Journalistic Code of Conduct and Practice, cited in the **Code of Conduct for the Practice of Journalism, Section 35(2) of the Media Council Act No 46 of 2013**, it is mandated that

(10) Headings shall reflect and justify the matter printed under them.

(11) Headings containing allegations made in statements shall either identify the body or the source making them, or at least carry quotation marks.

33. The second defendant was an employee of the Standard Group Limited as a journalist. His testimony was that the whole publication was extracted from court records and proceedings in **Nakuru HCCC 201 of 2012** and that was stated at the end of the publication in the Newspapers, a journalistic report of a court case, which was made without any ill-will or malice being true record of the court proceedings.

The plaintiffs and their witnesses testified to the truth of the court record and proceedings whose file was produced in court and therefore, true record.

34. Both rival parties quoted and cited the case **Nation Media Group –vs- Hon. Jakoyo Midiwo – Court of Appeal No.130/2013**, when the Learned Judges, relied on the words of **Peter Cater in Rucks Treatise on Libel & Slander**, as hereunder

“To state accurately and clearly what a man has done and then to express an opinion in comment which cannot do any harm or work injustice.

For the defence of fair comment to succeed, it must be proved that the subject matter of the comment is a matter of legitimate public interest, that the facts upon which the comment is based are true and that the comment is fair in the sense that it is relevant to the facts and in the sense that it is expressed of the honest opinion of the writers.

A writer is not entitled to overstep those limits and impute sordid motives not warranted by the facts.”

35. The above quotation summarises the practice and legal imperatives in the conduct and practice of journalistic reporting. Such has been adopted and applied in court decisions, among them **Phinehas Nyagah –vs- Gitobu Imanyara (2013) e KLR, Andrew Mukite Musangi & Another –vs- Standard Group Ltd (2012) e KLR;**

36. In my considered opinion, the defendants published matters of public interest, a fact agreed upon by the plaintiffs individually and collectively in their evidence in chief, and upon cross-examination.

Further, the Article stated clearly what was obtained from court records, and substantively agreed to by the plaintiffs.

The comments that appear on the digital news forum and the online edition and facebook publications are also based on the facts of the story, taken from the parties pleadings and affidavits, and therefore are fair comment and relevant to the facts.

37. A defamatory statement becomes defamatory if it is made about another party without just cause or excuse and whereby it causes suffering and injury to the person's reputation.

Porter in Turner –vs- Metro Goldwin Mayer Pictures (1950) I ALL ER where it was rendered that

“It is the duty of the court, in the first instance to put an accurate interpretation on the words used and having done so to make up his mind whether they are capable of defamatory meaning or not.”

38. Having done the above, I now come to the defendant’s defences, and their applicability to the circumstances of this case.

Section 6 of the Defamation Act, in respect of Newspaper reports of judicial proceedings states

“A fair and accurate report in any newspaper of proceedings heard before any court exercising judicial authority within Kenya shall be absolutely privileged.

Provided that nothing in this section shall authorize the publication of any blasphemous, seditious or indecent matter.

39. **Section 7** thereof speaks of qualified privilege of that

(1) Subject to the provision that:

“of this Section, the publication in a newspaper of any such report or other matter as is mentioned in the schedule to this Act shall be privileged unless such publication is proved to be made with malice.”

Part I of the **Schedule under Section 7 of the Act** provides for statements having qualified privilege and **Section 2** thereof speaks of fair and accurate report of any proceedings before a court exercising jurisdiction.

40. Thus newspaper reports of court proceedings, so long as they are **accurate**, and made **without malice** are privileged, more so if they are of public interest. **Lord Denning MR in Fraser and Others (1969) ALL ER 6** rendered that

“There are some things which are of such public concern that newspapers, the press and indeed everyone is entitled to make known the truth and to make their comment on it. This is an integral part of the right of speech and expression. It must not be whistled away.”

41. Further in the **Andrew Mukite Musangi case (Supra)**, the court held that

“A defence of fair comment is available to a defendant who is satisfied that the facts which are relied upon in support of the plea are true and he had reasonable evidence to support them, and reasonable grounds for supporting, and that sufficient evidence to prove them will be available at the trial, at which he intends to support the defence.”

42. While the above resonates well with the defendant’s actions, the plaintiffs are of a different opinion. **Firstly**, because, in their submission, Mt. Kenya University was an interested party in the case, and that an interested party is not a proper party, and it had no claim against the plaintiffs or any other party, and therefore the headline was defamatory.

Secondly, it was their submission that Mt. Kenya University had previously collaborated with the first plaintiff and the huge sums of money mentioned in the Article was collected from the first plaintiffs students, and when the collaboration ended, it entered into another collaboration with Great Lakes University of Kisumu which was built on the first plaintiff’s reputation in higher circles.

43. In both incidences, it is evident that the publication was of considerable interest to the public, the student population, their parents and sponsors, whose interest in the ongoing of and in the institutions and their management, including the court case, can not be underplayed. They are and were stakeholders. The defendants had a duty to make known the said issues by their Newspaper so long as the publication was fair comment and without malice.

44. I have earlier on stated that the court file in **Nakuru HCCC No.201/2012** was produced in court as PExt 2. On cross examination, the plaintiffs by PW1 fully agreed to the pleadings, and the court orders, as being true and correct. In the premises I find that the defendants had, in all respects, reasonable evidence and grounds, sufficient to support their publication. I do not find any malice in the entire publication.

45. **Article 33 of Kenya Constitution** guarantees the freedom of the media and in the circumstance, were exercising such rights, as well as performing their core duty of informing the public of matters of public interest.

46. Under the **Code of Conduct** for the practice of journalism, Paragraph 8, a person subject of the Act is not authorised to publish a story that fall short of factual accuracy and fairness – **Royal Media Services Ltd & Another –vs- Hon. Jakoyo Midiwo (Supra)**. In the case, the court held that, both under the Defamation Act and the Code of Conduct (referred to above) underscore the necessity of accurate reporting.

47. **Malice** ought to be established by credible and admissible evidence as an element of defamation.

Odunga J in **Phinehas Nyaga case (Supra)** rendered that

“Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the

facts....malice may also be inferred from the relations between the parties--- the failure to inquire in the facts is a fact from which inference of malice may properly be drawn.”

48. The wording of the publication which all parties had a chance to see and scrutinise, including those who had an interest in the same, in my view, raises no inferences either by the language or otherwise, from which malice may be inferred.

As stated above, it is an accurate report of court proceedings and fair comments arising from the said proceedings. I am satisfied that the article and the words complained of, including the phrase “**complex web**” were true and fair reporting of facts from court records and proceedings which under **Section 6 of the Defamation Act** is absolutely privileged and made without any malice by the defendant.

49. The Court in **George Mukuru Muchai –vs- The Standard Limited, HCCC 2539/97** held that the most important ingredient in a defamation case is the effect of the spoken or written words in the mind of third parties about the complainant, and not how he/she feels the words portray them- the Innuendoes.

Further, in the case **Nation Newspapers Ltd –vs- Chesire (1984) KLR 156, the Court of Appeal** held inter alia that

“An action for libel by innuendo depends for its success on the proof by the plaintiff that special circumstances are known to person who read the offending publication and evidence of the special circumstance.”

50. I have rendered earlier that no such evidence of innuendoes was tendered before this court by third parties as the plaintiffs could not be their own witnesses on issues of perception by other parties who knew them on their characters, reputation or professions.

51. Accordingly I find that the impugned **publication of the 16th June 2014** was an accurate and fair reporting of court proceedings and that the ingredients of defamation in the publication are lacking, and not proved. To that extent, the plaintiff’s case must fail, and the reliefs sought in the plaint, can not be availed to them.

52. Having come to the above findings and conclusion, I find it not necessary to proceed to assess general, exemplary and aggravated damages for the reasons that, there is no sufficient evidence on record to assist the court to determine the extent of injury loss and damages that may have been occasioned to any of the plaintiffs.

53. In conclusion, I wish to adopt the holding by the **Court of Appeal in John –vs- MGN Ltd(1997) QB 586 and KIAM –vs- MGN Ltd(2002) 3 WRL 1036** in the approach in assessing damages for defamation, and cited in the case **Johnson Evan Gicheru –vs- Andrew Morton & Another (2005) e KLR** that

“In assessing the appropriate damages, for injury to reputation the most important factor is the gravity of the libel, the more closely it touches the plaintiff’s personal integrity, professional reputation, honour courage loyalty and the core attribute of his personality, the more serious it is likely to be. The extent of publication is also very relevant, a libel published to millions has a greater potential to cause damage than a libel published to handful of people.”

54. Had the plaintiffs proved upon a balance of probability that the impugned publication was defamatory by proof of the necessary ingredients, I would not have hesitated, guided by the above principles, to assess the appropriate damages under the several subheads to each of the plaintiffs.

55. There being no basis upon which I may assess such damages, I proceed to dismiss the plaintiff’s case in its entirety with costs to the defendants.

Delivered, Signed and Dated at Nakuru this 17th Day of October 2019.

.....

J.N. MULWA

JUDGE